

# RESEARCH ARTICLES

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## Rescuing Cultural Heritage from War and Terrorism: A View from Switzerland

**Abstract:** Several reports reveal that trafficking in antiquities has become one of the sources of funding of the "Islamic State of Iraq and Syria". Switzerland, which is one of the principal markets for articles of archaeological interest, has adopted two pieces of legislation that may play an important role in countering the illicit trade of antiquities smuggled from Iraq and Syria. These are the *Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations* and the *Order Establishing Measures against Syria*. The objective of this article is twofold: first, to examine the most relevant aspects of these measures and their implications for art trade professionals and collectors; and second, to demonstrate that Switzerland is now keen to support foreign States' efforts to protect their cultural patrimony when threatened by war, terrorism, pillage and natural or human-induced disasters.

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**Keywords:** illicit trade, cultural heritage, terrorism, Islamic State of Iraq and Syria (ISIS), Switzerland, refuge (safe haven)

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## Introduction

The massive destruction of, or damage to, historic monuments and sites and the plundering of works of art that occurred during the wars of the 20th century led the international community to develop an international legal regime for regulating and safeguarding cultural heritage in times of armed conflict and occupation. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (hereinafter the “1954 Convention”)<sup>1</sup> was adopted in order to rectify the failings of the law of war as demonstrated by the massive losses which occurred during the Second World War. The First Gulf War and the atrocities committed during the Balkan Wars provoked a further strengthening of international rules. In 1999, the 1954 Convention system was completed by the adoption of its Second Protocol.<sup>2</sup> The gratuitous demolition of the monumental statues of the Buddhas of Bamiyan committed by the Taliban in 2001 prompted another development in international law. In 2003, the UNESCO General Conference unanimously adopted the Declaration Concerning the Intentional Destruction of Cultural Heritage in order to condemn the destruction of the Buddhas and to confirm that international law sanctions the inviolability of cultural heritage. Arguably, a further development in the international law concerning cultural heritage will be prompted by the assaults on archaeological treasures committed in Syria and Iraq by the militants of the self-proclaimed “Islamic State of Iraq and Syria” (ISIS), the al-Qaida breakaway group whose objective is the establishment of a State – a caliphate – under its interpretation of Islamic rule.

As is well known, the deliberate and widespread destruction of archaeological sites and monuments is motivated by ideological reasons: “central to ISIS ideology and action is the desire to rid the world of a [...] cosmopolitan past. [...] Any monument or motif, any artefact or architecture, any shrine, church or mosque that contradicts their strict and austere vision must be torn down and destroyed.”<sup>3</sup> In other words, ISIS terrorists seek to purge society of pagan or idolatrous items that do not conform to their interpretation of Islam. Even Islamic heritage is not spared by ISIS. Inasmuch as it promotes a fiercely purist school of Sunni Islam, ISIS militants deem the other Muslims to be heretics and seek to destroy places of worship venerated by Shi’ites and Sufis. From this perspective, the assaults against cultural objects by ISIS echoes not only the Taliban’s destruction of the Bamiyan Buddhas, but also the targeting of religious monuments during the Balkan Wars. In the latter case, the warring factions not only committed

<sup>1</sup> 14 May 1954, 249 UNTS 240.

<sup>2</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

<sup>3</sup> B. Isakhan, cited in: M. Bailey, *Iconoclasm Reborn with Islamic State Fanaticism*, “The Art Newspaper”, September 2014, No. 260, p. 6.

the most atrocious violations of the most elementary rules of humanity. In pursuit of the goal of eliminating the enemy ethnic groups, they deliberately desecrated or destroyed places endowed with religious beliefs in order to weaken the resistance of the enemies.<sup>4</sup>

Various gruesome propaganda videos document ISIS's cultural crimes. In July 2014, ISIS militants blown up the tomb of the prophet Jonah in Mosul (Iraq).<sup>5</sup> In February 2015, ISIS terrorists attacked the Public Library in Mosul, sending 10,000 books and more than 700 rare manuscripts up in flames.<sup>6</sup> In March 2015, the Iraqi Ministry of Tourism and Antiquities reported that ISIS militants bulldozed monuments in Nimrud, Hatra and Khorsabad.<sup>7</sup> In August 2015, an ISIS group razed Palmyra's monumental ruins.<sup>8</sup> In addition, several reports reveal that trafficking in antiquities has become one of ISIS's sources of funding, along with oil and kidnapping. Experts say that temples and other buildings are destroyed for the camera in order to conceal the evidence of what has been looted. Not only does the terrorist group smuggle looted artefacts via Turkey, Jordan and Lebanon to sell them to dealers in Europe and elsewhere, but it also requires that looters buy licenses to excavate in its territories.<sup>9</sup> In sum, ISIS now controls and profits from the smuggling of antiquities.<sup>10</sup>

This article aims to examine the legal responses deployed by Switzerland to counter the illicit trafficking of antiquities from Iraq and Syria. In particular, it focuses on the Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations<sup>11</sup> and the Order Establishing Measures against Syria.<sup>12</sup> The objective of the article is to shed new light on the Swiss actions in the field of cultural heritage. As is well known, Switzerland has long been considered as a major hub of the art trade – both licit and illicit. Indeed,

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<sup>4</sup> M. Bailey, op. cit.

<sup>5</sup> *Isis Militants Blow Up Jonah's Tomb*, "The Guardian", 24 July 2014.

<sup>6</sup> T. Thornhill, *ISIS Burn 10,000 Books and More than 700 Rare Manuscripts as They Destroy Library in Mosul in Latest Attack on Civilisation and Culture*, "Mailonline", 25 February 2015.

<sup>7</sup> M. Bailey, *Cultural Heritage at Heart of Propaganda Battle in Iraq*, "The Art Newspaper", April 2015, No. 267, p. 8.

<sup>8</sup> S. Jeffries, *ISIS's Destruction of Palmyra: 'The Heart Has Been Ripped Out of the City'*, "The Guardian", September 2015, No. 2.

<sup>9</sup> R. Fisk, *ISIS Profits from Destruction of Antiquities by Selling Relics to Dealers – and Then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting*, "The Independent", 3 September 2015; D. D'Arcy, *Isil Holds Heritage to Ransom to Fund Fighters, US Expert Warns*, "The Art Newspaper", 2 July 2015.

<sup>10</sup> However, it must be said that the looting of Syrian heritage commenced in 2012, when Syrian rebels fighting against President Bashar al-Assad resorted to the illicit trade to finance their effort. See A. Baker, M. Anjar, *Syria's Looted Past: How Ancient Artifacts Are Being Traded for Guns*, "Time", 12 September 2012.

<sup>11</sup> Loi fédérale sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, 20 June 2014, RO 2014 3545.

<sup>12</sup> Ordonnance instituant des mesures à l'encontre de la Syrie, 8 June 2012, RO 2012 3489.

available reported cases demonstrate that many objects stolen, clandestinely excavated or illicitly exported from source countries<sup>13</sup> have been bought in Switzerland under dubious circumstances by collectors and collecting institutions of market countries.<sup>14</sup>

## The Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations

In 1966, the Swiss Confederation adopted the Federal Law on the Protection of Cultural Property in the Event of Armed Conflict (hereinafter “Federal Law 1966” or “LPBC 1966”)<sup>15</sup> to give effect to the 1954 Convention and its First Protocol.<sup>16</sup> Nearly fifty years later, in 2013, the Swiss Federal Council requested the Federal Defence Department to launch a consultation procedure on the total revision of this act.

The Swiss Federal Council’s decision to revise the LPBC 1966 was grounded on the following reasons. The first relates to the circumstances that threaten cultural heritage. The Confederation, the cantons and the municipalities expressed concern that today cultural heritage must be protected from hazards other than war, namely natural disasters and emergency situations such as floods, fires, volcanic eruptions, earthquakes, and other climate change-related weather events. In sum, the Federal Council intended to address the absence of specific rules on the protection of cultural heritage in the event of disasters or other emergencies unrelated to situations of armed conflict. Interestingly, in its message of 13 Novem-

<sup>13</sup> “Source nations” are the countries that possess a very valuable – yet inadequately protected – patrimony of movable cultural objects that “market nations” demand for various social and economic reasons. J. Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property*, “Emory International Law Review” 2005, Vol. 19, pp. 227-303, at 233, fn 32. The distinction between “source” and “market” countries was first depicted by J.H. Merryman, *Two Ways of Thinking about Cultural Property*, “American Journal of International Law” 1986, Vol. 80, pp. 831-853.

<sup>14</sup> Here it suffices to mention two cases. The first is the case *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg* (717 F.Supp., 1374, S.D.Ind. (1989), *aff’d*, 917 F.2d 278, 7<sup>th</sup> Cir. (1990)). This case originated in the 1980s when Peg Goldberg, a US art dealer, acquired four 6<sup>th</sup> century mosaics in Geneva. The second is the criminal case against Giacomo Medici, a Geneva-based art dealer that sold numerous antiquities illicitly exported out of Italy to prominent museums and collectors in Europe and the United States. See P. Watson, C. Todeschini, *The Medici Conspiracy*, PublicAffairs, New York 2006.

<sup>15</sup> Loi fédérale sur la protection des biens culturels en cas de conflit armé, 6 October 1966, RO 1968 1065.

<sup>16</sup> First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358.

ber 2013,<sup>17</sup> the Federal Council provided some examples of natural or man-made catastrophes and emergency situations that hit Switzerland in recent times: the landslide in the village of Gondo of 2000, which reduced most of the 17th century Stockalper Tower to rubble; the floods in 2005 that damaged the precious collection of the Sarnen convent and the archives in Argovie; the fires that damaged the Chapel Bridge in Lucerne in 1993 and the Old City of Berne in 1997.<sup>18</sup> Secondly, the revision of the Federal Law was motivated by the fact that since 1966 Switzerland had ratified other relevant treaties in the field of international humanitarian law and international cultural heritage law, most notably the 1977 Additional Protocols to the 1949 Geneva Conventions<sup>19</sup> and the 1999 Second Protocol to the 1954 Convention.<sup>20</sup> The third reason related to the need to coordinate existing national legislation. Indeed, the revision was necessary to take account of the amendments to the Swiss Constitution<sup>21</sup> and to the Federal Law on the Protection of the Population and Civil Protection.<sup>22</sup>

In compliance with existing federal legislation,<sup>23</sup> the consultation procedure involved the Federal Council, the Federal Defence Department, the cantons, political parties, associations of municipalities and cities, universities,<sup>24</sup> and non-governmental organizations.<sup>25</sup> Generally speaking, all these institutions praised the expansion of the scope of the law to include natural disasters and emergency situations and the introduction of specific rules and procedures aimed at realizing the preventive protection of cultural heritage. At the same time, negative reactions were focused on the financial responsibilities related to the implementation of the law.<sup>26</sup>

The LPBC 1966 was replaced in 2014 as a result of the entry into force of the Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict,

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<sup>17</sup> Message concernant la révision totale de la loi fédérale sur la protection des biens culturels en cas de conflit armé, 13 November 2013, *Feuille Fédérale* 2013 (13.090), pp. 8051-8079.

<sup>18</sup> *Ibidem*, p. 8055.

<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977, 1125 UNTS 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609. These have been ratified by Switzerland on 10 February 1982.

<sup>20</sup> This was ratified by Switzerland on 9 July 2004.

<sup>21</sup> Constitution fédérale de la Confédération suisse, 18 Avril 1999, RO 1999 2556.

<sup>22</sup> Loi fédérale sur la protection de la population et sur la protection civile, 4 October 2002, RO 2003 4187.

<sup>23</sup> Loi fédérale sur la procédure de consultation, 18 March 2005, RO 2005 4099.

<sup>24</sup> Including the Art-Law Centre of the University of Geneva.

<sup>25</sup> Including the International Committee of the Red Cross, and the Swiss branch of the International Council of Museums (ICOM).

<sup>26</sup> In particular, all cantons criticized the cancellation of the financial contribution of the Federal Government for the documentation of cultural heritage items.

Catastrophe and Emergency Situations (hereinafter “Federal Law 2014” or “LPBC 2014”).<sup>27</sup> As demonstrated by the new title and its Article 1(a),<sup>28</sup> the LPBC 2014 has a broader scope of application in comparison with the previous law. As said, this enlargement is due to the perception that today cultural heritage items are threatened not only by the direct or unintended effects of armed conflicts, but also by natural or man-made disasters.

In this respect, it is worth mentioning a few initiatives adopted by certain specialized organizations in the past few years. In 2010, ICCROM,<sup>29</sup> ICOMOS,<sup>30</sup> IUCN<sup>31</sup> and the UNESCO World Heritage Centre published a resource manual on “Managing Disaster Risks for World Heritage”.<sup>32</sup> This manual demonstrates that the growing number of natural disasters around the world increasingly affects the cultural and natural sites inscribed in the list set up under the UNESCO World Heritage Convention.<sup>33</sup> Previously, the Swiss branch of the International Council of Museums (ICOM) had addressed the issue of disaster preparedness with regard to museums through the adoption of two documents: the “Guidelines for Disaster Preparedness in Museums”<sup>34</sup> and “Cultural Heritage Disaster Preparedness and Response”.<sup>35</sup>

In sum, the adoption of Federal Law 2014 allowed to overcome the narrow perspective inherent in the 1954 Convention and, consequently, in the LPBC 1966, which were imbued with the memory of the massive destruction and loss of cultural heritage which occurred during the Second World War.

## “Refuge”: A Tool to Protect Cultural Heritage from War, Terrorism and Disasters

The Federal Law 2014 is noteworthy in many respects, not least in how it respects the principles of sovereignty and subsidiarity as set forth in the Swiss Constitu-

<sup>27</sup> The LPBC 2014 was completed by the Ordonnance sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, 29 October 2014, RO 2014 3555.

<sup>28</sup> “La présente loi définit: (a) les mesures de protection des biens culturels à prendre en cas de conflit armé, de catastrophe ou de situation d'urgence”.

<sup>29</sup> International Centre for the Study of the Preservation and Restoration of Cultural Property.

<sup>30</sup> International Council on Monuments and Sites.

<sup>31</sup> International Union for Conservation of Nature.

<sup>32</sup> Available at: <http://whc.unesco.org/en/activities/630/> [accessed: 7.11.2015].

<sup>33</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

<sup>34</sup> Adopted in 1993, available at: <http://icom.museum/professional-standards/standards-guidelines/> [accessed: 7.11.2015].

<sup>35</sup> Adopted in 2004, available at: [http://archives.icom.museum/disaster\\_preparedness\\_book/](http://archives.icom.museum/disaster_preparedness_book/) [accessed: 7.11.2015].

tion.<sup>36</sup> On the one hand, the new law confirms that cultural protection is a cantonal responsibility.<sup>37</sup> On the other hand, it establishes that the sovereignty of the cantons must be coordinated with the power of the central government in matters of civil protection.<sup>38</sup> This means that the Federal Council has full responsibility with respect to the protection of cultural heritage in the event of armed conflict and other emergency situations.

For the purposes of the present study, however, it is necessary to focus on Article 12 of the LPBC 2014, which regulates the granting of “refuge” (or “safe haven”) to foreign States wishing to protect their cultural patrimony from the threats posed by war, terrorism, and disasters.<sup>39</sup>

According to Article 12 LPBC 2014, the Swiss Federal Government may provide a refuge for the cultural objects of foreign countries if they are threatened by armed conflicts, disasters, or emergency situations. The LPBC 2014 defines “refuge” as any protected space established and managed by the Federal Government pursuant to national law where movable artefacts belonging to the cultural patrimony of a foreign State can be stored temporarily for safekeeping, provided that such assets are seriously threatened in the territory of that foreign State.<sup>40</sup> Article 12 LPBC 2014 makes clear that the fiduciary safekeeping of threatened artefacts is provided under the auspices of UNESCO, and that the Swiss Federal Council has the exclusive competence to conclude international treaties with requesting States in order to implement this provision. The LPBC 2014 is silent on the question of the assessment of the situations (allegedly) threatening the cultural patrimony of the requesting State.<sup>41</sup> Nevertheless, it can be argued that a formal assessment is not necessary in those cases where UNESCO (or another international organization) has issued one or more statements declaring that the cultural patrimony of the requesting State is in danger. In all other cases, an assessment can be carried out by the Swiss Government on the basis of the information supplied by the requesting State and of the reports received through diplomatic channels.

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<sup>36</sup> See Articles 5(a) and 69 of the Constitution.

<sup>37</sup> Article 69 of the Constitution.

<sup>38</sup> “The legislation on the civil defence of persons and property against the effects of armed conflicts is the responsibility of the Confederation” (Article 61(1) Constitution); the “Confederation shall legislate on the deployment of civil defence units in the event of disasters and emergencies” (Article 61(2) Constitution).

<sup>39</sup> This issue was not covered by the LPBC 1966, even if the concept of refuge is contained in the 1954 Convention (Articles 1(b), 8, and 11).

<sup>40</sup> Article 2(c). Besides, Article 2(b) provides for “shelters” (“abris”) for the protection of cultural materials belonging to the Swiss national patrimony.

<sup>41</sup> The only relevant provision seems to be Article 3(2) LPBC 2014, which merely states: “La Confédération [...] entretient des contacts [...] à l’échelon international dans le domaine de la protection des biens culturels”.

The international treaties to be concluded pursuant to Article 12 LPBC 2014 should regulate such key issues as transport, protection, conservation, access, insurance, and exhibition of the objects entrusted to the Swiss State. On the other hand, the conclusion of a bilateral treaty is important from the domestic point of view as it constitutes a precondition to organizing the collaboration between all relevant federal bodies, including the Federal Office for Civil Protection, the Federal Office of Culture, the Directorate General of Customs, and the Swiss National Museum. The Federal Office for Civil Protection plays a key role in that it is responsible for the implementation of the 1954 Convention and its Protocols and of the bilateral treaties mentioned by Article 12(2) LPBC 2014 through the adoption of material or organizational measures.<sup>42</sup> The involvement of the Directorate General of Customs is essential to avoid that the items temporarily transported in Switzerland for refuge are subjected to customs duties or import tax. As these materials enter into the Swiss territory only to be stored in a refuge and not to be put into circulation or used in any other way, they are subject to a simplified regime named “Open customs warehouses”.<sup>43</sup> Finally, the Swiss National Museum is tasked with the management of the safe havens identified by the Federal Government.

Article 12 LPBC 2014 calls to mind Articles 8 and 14 of the Federal Law on the International Transfer of Cultural Property (hereinafter “LTBC”).<sup>44</sup> This act was adopted to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter “1970 UNESCO Convention”).<sup>45</sup> In particular, Articles 8 and 14 LTBC were inserted to give execution to Article 9 of the 1970 UNESCO Convention. Article 9 calls upon the States Parties to “participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce” in support of the State Party “whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials”. Article 8 LTBC empowers the Federal Council

<sup>42</sup> See Article 8 of the Ordonnance sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, op. cit.

<sup>43</sup> See Article 50 of the Custom Law (*Loi sur les douanes*), 18 March 2005, RO 2007 1411.

<sup>44</sup> Loi fédérale sur le transfert international des biens culturels, 20 June 2003, RO 2005 1869. On this law see P. Gabus, M.-A. Renold, *Commentaire LTBC, Loi fédérale sur le transfert international des biens culturels*, Schulthess, Zürich 2006.

<sup>45</sup> 14 November 1970, 823 UNTS 231. The objective of the LTBC – in line with the main goal of the 1970 UNESCO Convention – is to “contribuer à protéger le patrimoine culturel de l'humanité et prévenir le vol, le pillage ainsi que l'exportation et l'importation illicites des biens culturels” (Article 2(2)). The assistance in law enforcement provided by the LTBC is based on four means: bilateral agreements; stricter duty of care for State museums officials and art dealers; a renewed international cooperation in criminal matters; and tighten controls over free ports. See M.-A. Renold, *Le droit de l'art et des biens culturels en Suisse: questions choisies*, “Revue de droit suisse” 2010, Vol. 129, pp. 137-220, 182.



to adopt provisional measures aimed at restricting or prohibiting the transit or export of archaeological or ethnological objects if the country of origin is subject to intense pillage or in other exceptional circumstances, such as armed conflicts and natural catastrophes.<sup>46</sup> In sum, the Swiss Federal Council can invoke Article 8 LTBC whenever it intends to adopt specific measures for safeguarding the patrimony of a foreign State. On the other hand, under Article 14 LTBC the Swiss Government may grant financial assistance to museums or similar institutions situated in Switzerland for the temporary safekeeping of the cultural objects of other States which are threatened in their territory as a consequence of extraordinary events. This type of assistance is subject to the following additional conditions: (i) the foreign State expressed its consent to the temporary safekeeping (or failing that, the deposit is placed under the auspices of UNESCO or another international organization); and (ii) the cultural objects concerned must be returned to the country of origin following the normalization of the situation.

Furthermore, it is interesting to analyse Article 12 of Federal Law 2014 in the light of Article 5 of the 1999 Second Protocol. This latter provision calls on States Parties to take appropriate “preparatory measures” in peacetime “for the safeguarding of cultural property [situated within their own territory] against the foreseeable effects of an armed conflict”, such as “the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property”. Ostensibly, the LPBC 2014 goes further than the 1999 Second Protocol in that it is designed to offer protective measures not only for Swiss cultural patrimony but also for the treasures of foreign States. Furthermore, the LPBC 2014 displays a broad understanding of cultural heritage protection in peacetime as it addresses, as said, the possible consequences of natural and civil disasters and armed conflicts, including terrorist attacks.<sup>47</sup>

Finally, it is important to emphasise that the Federal Law 2014 establishes that third parties – e.g. a creditor of the foreign State – cannot make claims with respect to the objects transferred to Switzerland in accordance with a bilateral treaty concluded pursuant to Article 12 LPBC 2014. This means that the refuge granted to foreign States aims to protect cultural objects also from legal actions that can be filed by third parties seeking the seizure or attachment of cultural assets for reasons extraneous to their transfer to Switzerland.

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<sup>46</sup> See Ordonnance sur le transfert international des biens culturels, 13 April 2005, RO 2005 1883.

<sup>47</sup> On the adoption of an integrated approach to peacetime planning see P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO, Paris 1993, paras. 5.42-5.43, p. 71.

## The ILA Guidelines on Safe Havens

In 2008, the Committee on Cultural Heritage Law of the International Law Association (ILA) adopted the “Guidelines for the Establishment and Conduct of Safe Havens for Cultural Materials”.<sup>48</sup> The Committee’s interest in the concept of safe havens grew out of the observation that cultural objects may need to be removed from the source State temporarily in order to ensure their safekeeping because of various threats, such as armed conflicts, natural catastrophes, civil disasters, and unauthorized excavations. The objective of the ILA Committee was to establish specific standards and procedures for rescuing, safekeeping, and returning cultural assets after the threats prompting their removal have come to an end and the materials can again be protected in the source State. Therefore, the Guidelines were intended to be integrated into State legislation and the internal rules of museums, professional associations and non-governmental organizations.

However, it seems that the ILA Guidelines were not taken into consideration during the consultation procedure that led to the adoption of the LPBC 2014. In effect, from a comparison of the two texts it results that the Guidelines are not reflected in Article 12 of the Federal Law 2014. For instance, the LPBC 2014 does not contain any reference to the laws and traditions of the State of origin of the material protected with respect to their preservation and display, while the ILA Guidelines underscore, for example, that safe havens must store human remains and religious objects according to the religious and cultural traditions and practices in the source State. Likewise, the Guidelines emphasize that these materials should not be exhibited when it would be inappropriate under the norms or customs of the State or culture of origin. Moreover, the LPBC 2014 does not specifically address the question of the legality of the exportation of cultural objects from the State which requested the safe haven, or the issue of the loan of entrusted artefacts. In addition, the issue of dispute resolution through non-adversarial mechanisms, such as good-faith negotiations and consultations, is contained in the ILA Guidelines but not in the LPBC 2014, which only indicates that the treaties concluded by the Federal Council should cover the issues of the applicable law and the competent tribunal.

In spite of these differences, it would be hasty to criticize the Swiss legislator on the grounds that the Federal Law 2014 does not reproduce the text of the Guidelines. It can be submitted that this mismatch could be resolved through the bilateral treaties concluded under Article 12(2) LPBC 2014. Indeed, it can be expected that the ILA Guidelines will be used during negotiations as a model to enhance international cooperation and the preservation and valorization of the

<sup>48</sup> See Resolution 2/2008, adopted at the 73<sup>rd</sup> Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17-21 August 2008, <http://www.ila-hq.org/en/committees/index.cfm/cid/13> [accessed: 7.11.2015].

cultural heritage items entrusted to the Swiss Government. However, not all issues can be resolved through bilateral negotiations. In particular, it is likely that the questions concerning the legality of the ownership title of the requesting State, on the one hand, and the validity of the restitution claims raised by third parties over the cultural heritage items covered by a bilateral treaty concluded pursuant to the LPBC 2014, on the other hand, would not be taken into account. The reason is that the objective of Article 12 the Federal Law 2014 is not to redress past wrongs by providing the restitution of (allegedly) wrongfully removed antiquities; rather it seeks to ensure the safekeeping of cultural assets that are threatened by extraordinary events.

### Refuges for Cultural Objects Exemplified

The setting up of refuges to facilitate the protection of the cultural patrimony of foreign States is part of the humanitarian tradition of the Swiss State. As is well known, during the Spanish Civil War (1936-1939) a vast number of paintings belonging to the *Museo Nacional del Prado* of Madrid were transferred to the *Musée d'art et d'histoire* (MAH) of Geneva. More recently, before the 2001 war in Afghanistan commenced, the cultural treasures of the National Museum of Kabul were transferred for safekeeping to Switzerland at the initiative of a Swiss citizen in order to be stored at the Afghanistan Museum in Bubendorf.<sup>49</sup>

Another example relates to a vast collection of precious archaeological objects representing Gaza's rich cultural heritage that are currently in Geneva. These treasures, which belong to the collection of Palestinian businessman Jawdat Khoudary and to the Palestinian Authority, arrived in Switzerland in 2007 in the context of the exhibition "Gaza à la croisée des civilisations", organized by the MAH. This exhibition was meant to represent the first step towards the creation of an archaeological museum in Gaza. However, this project was blocked because of the Hamas takeover in June 2007 and the ensuing political insecurity. As a consequence, the City of Geneva and the MAH – with the consent of both the Palestinian Authority and Jawdat Khoudary – pledged to retain the collection until it can be returned safely to Gaza. The collection has been stored at the Free Port of Geneva ever since, though some pieces have been loaned abroad.<sup>50</sup> Notably, both the Afghanistan Museum in Bubendorf and the MAH have requested the financial assistance of the Swiss Government under Article 14 LTBC.<sup>51</sup>

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<sup>49</sup> Message concernant la révision totale de la loi fédérale, op. cit., p. 8058.

<sup>50</sup> C. Zumbach, *Des trésors de Gaza embarrassent Genève, qui appelle Berne à l'aide*, "Tribune de Genève", 21 November 2014.

<sup>51</sup> P. Gabus, M.-A. Renold, op. cit.

Of course, Switzerland is not the only place where the relics of the past can find refuge from the scourge of war, terrorism, and other human-induced disasters.<sup>52</sup> For instance, Lebanon is filling warehouses with looted artefacts that have been intercepted by Lebanese authorities at the airport, ports, and at the land border. Seized objects are catalogued and stored in guarded warehouses until they can be returned to their countries of origin, most probably Syria and Iraq. However, while for many antiquities it is possible to establish their origin, for many others this is a difficult task in the absence of information from the country of origin. Regardless, Lebanon's vigilance in the face of widespread looting and trafficking of cultural objects by ISIS in Syria and Iraq is one of the few rays of light in an otherwise bleak scenario.<sup>53</sup>

Another example relates to the ongoing case of the "Crimean Scythian Gold". This is a collection of thousands of precious golden artefacts that was gathered from five Ukrainian museums – one in Kiev and four in Crimea – and delivered to the Allard Pierson Museum of Amsterdam in February 2014 for the exhibition "Crimea: Gold and Secrets of the Black Sea". Problems arose as a result of Russia's annexation of Crimea, which took place after the exhibition opened. At the end of the exhibition the Dutch museum returned only the objects borrowed from the museum in Kiev. The remaining artefacts are claimed by the museums of Crimea (and Russia) and the Ukrainian Government. The former insist that the artefacts should be returned to the museums that lent them out, while the latter demands the Netherlands to return the Crimean exhibits to Kiev on two grounds: (i) these objects are State property; and (ii) the exhibits cannot be returned to an occupied territory temporarily out of Ukraine's control.<sup>54</sup> In a press statement of August 2014, the Allard Pierson Museum said that it intended to retain and store the disputed objects until a court has determined who their rightful owner is.<sup>55</sup> It thus appears that the Dutch museum essentially decided to grant refuge to this collection despite the absence of an official request on the part of the foreign State(s) concerned. Ostensibly, it was the uncertainty regarding the question of

<sup>52</sup> Interestingly, the LPBC 2014 has inspired a number of French parliamentarians to approve an amendment to the project of the Loi relatif à la liberté de la création, à l'architecture et au patrimoine regarding the provision of safe havens for the movable heritage of foreign States. See G. Clavel, *Un 'amendement Palmyre' adopté pour offrir l'asile aux biens culturels en danger*, "Le Huffington Post", 17 September 2015. A similar move has come from the Association of Art Museum Directors (AAMD), which has compiled a list of guidelines offering museums around the world which are under threat from conflict or natural disasters the opportunity to transfer their holdings to any AAMD member institution for safekeeping until conditions for their safe return can be guaranteed. See H. Neuendorf, *Museum Group Offers Safe Haven for Threatened Art and Antiquities*, "Artnet News", 2 October 2015.

<sup>53</sup> E. Knutsen, *Lebanon Safeguards Region's Cultural Heritage*, "The Daily Star", 12 June 2015.

<sup>54</sup> *Ukrainian Parliament Asks Netherlands to Return Crimean Scythian Gold*, "Russia Beyond the Headlines", 12 May 2015.

<sup>55</sup> The press release is available at: <http://www.allardpiersonmuseum.nl/en/press> [accessed: 7.11.2015].

ownership resulting from the unlawful annexation of Crimea and the ensuing political and military instability of the area that led the Allard Pierson Museum to take this – unilateral – course of action. It is for this reason that the four museums in Crimea sued the city's Allard Pierson Museum for the return of the treasure. The Dutch State sought to intervene in the dispute to ensure compliance with international law. However, in April 2015 the Amsterdam District Court ruled that the Dutch Government cannot participate in the civil suit because this is between the parties claiming ownership – that is, Ukraine and the claimant museums.<sup>56</sup>

## The Order Establishing Measures against Syria

In June 2011 the Swiss Federal Council adopted the Order Establishing Measures against Syria (hereinafter the “Order”). In this instance, Switzerland followed the example set by the European Union, which imposed sanctions against Syria in May 2011. These restrictive measures were decided upon due to the violent repression of the civilian population by the Syrian security forces. In its original version the Order provided for restrictions on trade and services and the freezing of assets, but did not address the problem of the looting and illicit trafficking in Syrian antiquities. The reason for this omission was probably that the protection of Syria's archaeological patrimony was not deemed imperative in the face of the death toll caused by the civil war. However, UNESCO, through its Director-General Irina Bokova, repeatedly called upon the international community to take action to stop the loss of cultural heritage caused by the civil war between the Free Syrian Army and the regime of Syrian President Bashar al-Assad.<sup>57</sup> These calls increased when it became clear that ISIS was engaged in the destruction of monuments and the looting of antiquities.

In December 2014, when discussions on how to counter the Syrian civil war and the rise of ISIS were ongoing in different international fora, the Swiss Federal Council revised the Order under examination to include a specific provision on “Prohibitions concerning cultural objects” (Article 9(a)). The first paragraph of this provision establishes that the import, export, transit, sale, distribution, brokerage and the acquisition of cultural objects belonging to the cultural heritage of Syria is prohibited, if there is reason to believe that such objects were stolen or illegally exported.<sup>58</sup> Article 9(a) is retroactive as it prohibits any international trade in Syrian antiquities that have been illicitly exported since 15 March 2011.

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<sup>56</sup> *Dutch Courts Bar Government from Dispute over Crimean Gold*, “Reuters”, 8 April 2015. As of writing, a date for the court's ruling on ownership has not been set.

<sup>57</sup> See A. Baker, M. Anjar, op. cit.

<sup>58</sup> Annex 9 of the Order lists the objects forming part of the patrimony of Syria.

It was only in February 2015 that a similar provision was adopted by the United Nations Security Council in Resolution No. 2199.<sup>59</sup> With this Resolution the Security Council condemned the destruction of cultural heritage committed by ISIS and other groups in Iraq and Syria and acknowledged that these terrorist groups are “generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items [...], which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks”.<sup>60</sup> More importantly, the Security Council adopted legal measures to counter the illicit trafficking of antiquities removed from these States: “The Security Council [...], [a]cting under Chapter VII of the Charter of the United Nations, [...] [r]eaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property [...] illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, [...] thereby allowing for their eventual safe return to the Iraqi and Syrian people [...]”.<sup>61</sup> In sum, Resolution 2199 (2015) aims to place economic and diplomatic sanctions on the countries and individuals that enable ISIS and other terrorist groups to profit from the illicit trade in antiquities. The Director-General of UNESCO welcomed the resolution, calling its adoption “a milestone for enhanced protection of cultural heritage in Iraq and Syria”.<sup>62</sup>

Hence it may be concluded that the Swiss State, by revising the *Order Establishing Measures against Syria* in December 2014, anticipated the Security Council's action, thereby displaying, in my view, a proactive attitude vis-à-vis the pillage of Iraq's and Syria's culture and, in turn, the suppression of one of ISIS's sources of funding.

## Concluding Remarks

Switzerland is one of the principal markets for articles of archaeological interest and it has long been considered as a major hub for the “laundering” of antiquities stolen, clandestinely excavated, or illicitly exported from source countries. In recent times the Swiss State has moved to change its gloomy reputation by the adoption

<sup>59</sup> United Nations Security Council Resolution No. 2199, 12 February 2015, UN Doc. S/RES/2199 (2015) on “Threats to international peace and security caused by terrorist acts”. See also United Nations General Assembly Resolution on “Saving the Cultural Heritage of Iraq”, 21 May 2015 (A/69/L.71).

<sup>60</sup> Ibidem, para. 16.

<sup>61</sup> Ibidem, para. 17.

<sup>62</sup> UNESCO, press release, 12 February 2015, [http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/unesco\\_director\\_general\\_welcomes\\_un\\_security\\_council\\_resolution\\_to\\_step\\_up\\_protection\\_of\\_cultural\\_heritage\\_in\\_syria\\_and\\_iraq/#.VaDvyPnw-24](http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/unesco_director_general_welcomes_un_security_council_resolution_to_step_up_protection_of_cultural_heritage_in_syria_and_iraq/#.VaDvyPnw-24) [accessed: 7.11.2015].

of two pieces of protective legislation. This article has examined the LPBC 2014 and the Order on Syria by focusing on their origin, revision, and on the most relevant norms. In particular, this article has dwelt on the provisions regulating the granting of refuge to cultural objects of foreign States that are threatened by armed conflicts, disasters, or other emergency situations.

Although these new laws are in place, it is too early to say whether these instruments will achieve the declared objectives. Nevertheless, these norms signal that Switzerland is now keen to support and cooperate with foreign States in their efforts to protect the national artistic patrimony when threatened by natural disasters or human-induced dangers, such as war and terrorism. In this respect, it must be mentioned that various collectors and collecting institutions that reside in market countries have advanced the view that the purchase of antiquities looted in conflict zones or unstable countries is preferable to leaving those items to uncertain fates. These have suggested that buying objects on the black market provides them with a safe haven from oblivion, while others have argued that the destruction of ancient sites in the Middle East by ISIS proves that only the “universal museums” in the West can preserve the world’s cultural heritage.<sup>63</sup> In my view both of these arguments are untenable. The market cannot be the solution to the problems at stake. In particular, it has been correctly pointed out that the purchase of looted antiquities is going to worsen the problem. As has been said, it is increasingly clear that terrorist groups use the sale of antiquities as a revenue stream. Collectors and art trade professionals must therefore be mindful that by purchasing looted relics from Syria and Iraq they are not rescuing heritage; rather they are, first, supporting – albeit indirectly – the cultural cleansing carried out by ISIS and other criminal groups and their transnational crime networks;<sup>64</sup> and, second, weakening the efforts deployed by States and international organizations to put a halt to such cultural crimes.

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<sup>63</sup> K. Tharoor, *Museums and Looted Art: The Ethical Dilemma of Preserving World Cultures*, “The Guardian”, 29 June 2015; A. Bauer, *Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications*, “International Journal of Cultural Property” 2015, Vol. 22, pp. 1-6.

<sup>64</sup> D. D’Arcy, op. cit.; A. Bauer, op. cit.

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